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No. 84-1601

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

AETNA LIFE INSURANCE COMPANY,

Appellant,

vs.

MARGARET W. LAVOIE,
and ROBERT L. LAVOIE, SR.,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF ALABAMA

THE BRIEF OF THE ASSOCIATION OF CALIFORNIA TRIAL LAWYERS AND THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICI CURIAE IN SUPPORT OF APPELLEE

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INTEREST OF AMICI CURIAE

With the consent of the parties, the California Trial Lawyers Association and the Association of Trial Lawyers of America respectfully submit this brief as *amici* curiae in support of appellees. The copies of the letters of both parties confirming this consent have been filed with this court.

The California Trial Lawyers Association ("CTLA"), founded in 1962, is a voluntary organization comprised of approximately 5,000 trial lawyers. The Association of Trial Lawyers of America ("ATLA"), founded thirty-eight years ago, is a voluntary national association of over 55,000 trial attorneys whose members regularly appear in both state and federal court. The predominant practice of most CTLA members is in the representation of injured tort victims and victims of consumer fraud. ATLA members primarily represent injured tort victims, people who have been discriminated against, and people accused of crimes.

Both Associations, through their appropriate officers and committees, have authorized the participation in this case as *amici curiae*.

Amici are concerned that the position taken by appellants and *amici* counsel, in support of appellants, is simply another attempt to shelter tortfeasors by taking away one of the strongest deterrents to tortious conduct, punitive damages. The attempt at withdrawal of this remedy shows once again that the insurance industry is more concerned with the profitability of the tortfeasor than the wrongful and tortious misconduct exhibited by these entities. Wrongful civil conduct should not go unchecked within the context of civil litigation.

We believe that a reversal of the decision of the Supreme Court of Alabama would harm large segments of our society and would violate fundamental principles of the Anglo-American legal system.

SUMMARY OF ARGUMENT

In this brief, *amici* will demonstrate that the relationship of punitive damages in civil litigation is not the conceptual

equivalent of "punishment" in the context of criminal law. Therefore, because punitive damages are civil and not criminal in nature, the Excessive Fines Clause of the Eighth Amendment is inapplicable to these proceedings. Furthermore, existing procedures available to defendants in civil litigation affords sufficient due process safeguards. Limiting and restricting civil punitive damage awards will only serve to encourage intentional and calculated misconduct. Such intentional and profitable civil misconduct should not be protected or condoned.

INTRODUCTION

Appellants and *amici*, in support of appellants, do not address the issue of the need for punitive damages in the civil context nor the therapeutic value in the application of punitive damages. The necessity and justification for punitive damage awards are readily apparent when the facts of such cases are explored. Instead of resolving the circumstances and problems that lead to these punitive verdicts, appellant/*amici* dwell on the fact that more defendants are getting caught today than fifteen years ago. Worse yet is the complaint regarding how expensive it is once the conduct is exposed.

California courts have awarded punitive damages based on conduct which no reasonable person would consider acceptable: *Fletcher v. Western National Life Insurance Company*, 10 Cal.App.3d 376 (1970) [Disability insurance benefits terminated on false pretext — defendants concede their conduct was "deplorable" and "outrageous."]; *Wetherbee v. United Insurance Company of America*, 265 Cal.App.2d 921 (1968) [Disability insurance benefits wrongfully terminated on basis that although totally disabled, the insured was not continuously house confined.];

qualification is expected other than involving financial interest: when a judge (1) has a prior relationship with some person either a party to or representing a party to the case; (2) has personal knowledge of the case before him; or (3) has a personal bias or prejudice against some person a party to the case. This result has been reached by both judicial decision and statute. *See, e.g., Petrey v. Holliday,* 199 S.W. 67 (Ky. 1917) (relationship); CAL. CIV. PROC. CODE § 170 (1) (West Supp. 1981) (personal knowledge of case); and *Berger v. United States,* 255 U.S. 22 (1921) (bias towards class of people).

The common law rule that only direct pecuniary interest in the case was grounds for disqualification has also been expanded in American practice. When a judge owns corporate stock in a case wherein the corporation is interested, he is disqualified from presiding over the case. *Gaer v. Bank of Baker,* 107 P.2d 877 (Mont. 1941); *State v. Chillingworth,* 116 So. 633 (Fla. 1928).

When the judge has an interest other than direct ownership or pecuniary gain the issue becomes the remoteness of the interest. While grounds for disqualification at common law, courts are split on whether a judge may sit in a case where his ruling will affect tax or utility rates in his home comunity. *See Peters v. Meeks,* 171 So. 2d 562 (Fla. Dist. Ct. App. 1964); *Pradwzik v. Grand Rapids,* 21 N.W.2d (Mich. 1946); *City of Grafton v. Holt,* 52 S.E. 21 (W. Va. 1905).

Nonetheless, a basic American principle is that the interest which constitutes grounds for disqualification must be direct and capable of demonstration, rather than remote, theoretical, speculative, or contingent. *Evans v.*

Gore, 253 U.S. 245 (1920); *City of Bangor v. American Federation of State, County, and Mun. Employees,* 449 A. 2d 1129 (ME. 1982); *Kostal v. People,* 414 P.2d 123 (Colo. 1966), *cert. denied,* 385 U.S. 939; *State ex rel. Anaya v. Scarborough,* 410 P.2d 232 (N.M. 1966); *Ferguson v. Brown,* 21 So. 603 (Miss. 1897); *Trustees of Internal Revenue Fund v. Bailey,* 10 Fla. 213 (1818).

Bias, or impartiality, is the most often invoked and difficult to prove ground of disqualification. In the proper circumstances, it is grounds requiring the recusal of a judge. Essentially, bias encompasses all the familiar grounds for disqualification as they can be seen as reasons why a judge would not be impartial. An established principle is that the bias or prejudice that will disqualify a judge must be personal as distinguished from judicial. *U.S. v. Grinnell Corp.,* 384 U.S. 563 (1966); *Lyons v. U.S.,* 325 F.2d 370 (9th Cir. 1964), *cert denied,* 377 U.S. 969; *Tynan v. U.S.,* 376 F.2d 761 (D.C. Cir. 1967), *cert denied,* 389 U.S. 845; *Eisler v. U.S.,* 170 F.2d 273 (D.C. Cir. 1948); *Brooks v. U.S.,* 458 A.2d 66 (D.C. App. 1983); *Stone v. Dept. of Pensions and Securities,* 421 So.2d 129 (Ala. Civ. App. 1982); *State v. Buckley,* 244 A.2d 254 (R.I. 1968); *Walker v. People,* 248 P.2d 287 (Colo. 1952). Also, the cases are clear that personal bias or prejudice against one party or in favor of another does not arise solely on the basis of a biased state of mind against a wrongdoer acquired from evidence presented at trial, or from the possession of definite views on the law, or an impersonal prejudice which goes to the judges background or experience rather than an apprai[illegible]sel of the defendant personally. *Laird v. Tatum,* 409 U.S. 824 (1972); *Scott v. Beams,* 122 F.2d 777 (C.C.A. 10th, 1941); *U.S. v. Gilboy,* 162 F. Supp.

384 (M.D. Penn. 1958); *U.S. v. Ramos*, 291 F. Supp. 71 (D.R.I. 1968); *People v. Yeager*, 359 P.2d 261 (Cal. 1961).

In *Johnson v. Salem Corporation*, 458 A.2d 1290 (N.J. Super. Ct. App. Div. 1983), defendants in a products liability action sought to have the trial judge disqualified on the basis that the judge had some 30 years prior injured his fingers in a machine shop. The court held that a judge is not ordinarily disqualifiable because of his own life experiences; and that because a judge may have previously sustained personal injury in a machine shop was not grounds for disqualifying the judge in a products liability action arising out of an industrial accident. Said the court:

> Obviously a judge is not disqualified from presiding at an automobile accident trial merely because he was once himself in an automobile accident. Nor is a judge disqualified from trying a divorce case either because he is himself married or divorced, or from trying a contested adoption case because he has either natural children or adopted children.

Johnson, 458 A.2d 1290, 1295.

The overall emerging principle on disqualification of judges in both federal and state courts, as based on the foregoing rules, is that a justice or judge should recuse himself in any proceeding in which his impartiality might *reasonably* be questioned. This principle is embodied in 3(C) of the Canons of Judicial Ethics which guide the federal system, as codified in 28 U.S.C. § 455, and the majority of states, including Alabama, which have also codified the Cannons to guide their courts.

C. Disqualification Practice In Alabama

Prior to the adoption of the Canons of Judicial Ethics, Alabama's disqualification practice was similar to that of

other jurisdictions. Causes for disqualification of a judge were those affecting (1) his individual rights, (2) pecuniary interest, (3) relation to a party, and (4) any interest the probable and natural tendency of which would create bias in the mind of the judge for or against a party to the suit. *Woodmen of the World v. Alford*, 206 Ala. 18, 89 So. 528 (1920). Holding that a judge related within the fourth degree of affinity or consanguinity to the slain was disqualified to try the one charged with the murder, the Supreme Court noted that the stern morality of the common law required a judge to be *legally* indifferent between the parties. *Gill v. State*, 61 Ala. 169 (1878).

Alabama courts also recognize that the interest which disqualifies a judge must be direct and immediate, rather than remote and contingent. *Woodmen of the World v. Alford*, 206 Ala. 18, 89 So. 528 (1920). Such a remote, speculative interest as is averred by petitioners is not the type interest which either the common law or Canon 3(C) of the Canons of Judicial Ethics contemplates. As the Alabama Supreme Court explained in *Ex Parte State Bar Association*, 92 Ala. 113, 8 So. 768 (1890):

> The interest which will disqualify must be a pecuniary one, or one affecting the individual rights of the judge. . . . [T]he liability or pecuniary gain or relief to the judge must occur upon the event of the suit, not result remotely, in the future, from the general operation of law upon the *status* fixed by the decision.

92 Ala. at 118 [Emphasis by the court].

Applying Canon 3(C) (1) of the Alabama Canons of Judicial Ethics in *Acromag-Viking v. Blalock*, 420 So.2d 60 (Ala. 1982), the court ruled that a trial judge who was

on the board of directors of a corporation which employed the defendant, should have recused himself from the case. The court, noting that recusal is not required by a mere accusation of bias unsupported by substantial fact, recognized that substantial facts existed to question the trial judge's impartiality. *See also Hartman v. Board of Trustees of the University of Alabama,* 436 So.2d 837 (Ala. 1983), where the court, in line with both state and federal practice, noted that bias and prejudice may not be presumed or inferred by a judge's subjective views. *Id.* at 841. Cf. *In Re Sheffield,* 465 So.2d 350 (Ala. 1984); *Wallace v. Wallace,* 352 So.2d 1376 (Ala. Civ. App. 1977).

In accordance with the Alabama Canons of Judicial Conduct, justices of the Alabama Supreme Court have readily recused themselves whenever required by law or when their impartiality might *reasonably* be questioned. In 1967 the entire Court recused itself when a fellow justice's personal injury suit reached the Court on appeal. *Ex Parte Alabama Power Co.,* 280 Ala. 586, 196 So.2d 702 (1967). The entire Court also recused itself in *Duncan v. Johnson,* 338 So.2d 1243 (Ala. 1976), because of the apparent involvement of one of their members in the questioned controversy.

Mr. Justice Embry, following the letter and spirit of the Canons of Judicial Ethics, has readily recused himself, whether asked to or not, in any cases in which any *reasonable* argument could be made that he had an interest in the outcome or would be prejudiced against one party or another. *See, e.g., Blue Cross and Blue Shield of Alabama v. Granger,* 461 So.2d 1320 (Ala. 1984); *Ex Parte Roach,* 414 So.2d 80 (Ala. 1982); *Churchill v. Board of Trustees,* 409 So.2d 1382 (Ala. 1982); *Roach v. Bynum,*

403 So.2d 187 (Ala. 1981); *Herston v. Whitesill*, 348 So.2d 1054 (Ala. 1977); *Ex Parte Bynum*, 348 So.2d 828 (Ala. 1977); *Lowery v. State*, 317 So.2d 360 (Ala. 1975).

Such was the case when Mr. Justice Embry recused himself from consideration of the case of *Blue Cross/Blue Shield of Alabama v. Granger*, 19 ABR 444 (Dec. 21, 1984). That case, of course, involved the same defendant which Mr. Justice Embry is presently maintaining an action against and involved consideration of the business practices of that company which also would be involved in his pending action.

The same considerations which led to Mr. Justice Embry's recusal in the *Granger* case are clearly absent from the present cases. There is no action pending on behalf of Mr. Justice Embry against either Aetna or Nationwide. The business practices of Blue Cross/Blue Shield, who he does have an action against, are not being scrutinized in the present case. Nor are the business practices of Nationwide or Aetna considered in these cases like those of Blue Cross and Blue Shield put at issue by Mr. Justice Embry's complaint in *T. Eric Embry, etc. v. Blue Cross/Blue Shield of Alabama.*

The factual dissimilarities between Mr. Justice Embry's case and the present cases are especially significant when you consider that the Alabama Supreme Court has consistently held, including the present appeal filed by Aetna, that:

> Whether an insurance company is justified in denying a claim under a policy must be judged by what is before it at the time the decision is made.

National Savings Life Insurance Co. v. Dutton, 419 So.2d 1357, 1362 (Ala. 1982); *Federated Guaranty Life Ins. Co. v.*

Wilkins, 435 So.2d 10, 13 (Ala. 1983). It follows that the success of or the failure of Mr. Justice Embry's case will turn upon the facts proved in that case, not the facts proved against Aetna and Nationwide in the present cases.

Regardless of the outcome of the present cases, Mr. Justice Embry will not be relieved of his burden of proof in his case against Blue Cross/Blue Shield. He will still have to meet the burden of proof and, on the facts of that case, convince twelve jurors that he is entitled to recover.

In addition to what has been said above, it is worth noting that Mr. Justice Embry does not have any financial interest whatsoever in these cases. Regardless of whether these cases are affirmed or reversed, Mr. Justice Embry will not receive any benefit by way of the awards in these cases, either directly or indirectly.

D. The Determination of the Qualification To Sit.

> Each justice must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances.[4]

The commentary to section 3.42 of the American Bar Association Standards Relating to Appellate Courts explains why the question of recusal of an appellate judge is best decided by the judge himself:

> "An appellate judge should be subject to challenge for cause on the same grounds as a trial judge, and also when an appeal involves a review of his own decision. The most difficult problem concerns the procedure to be employed. As in the challenge of a

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[4] *In re Estate of Carlton*, 378 So. 2d 1212, 1216 (Fla. 1979), *cert. denied Hayes v. Rogers*, 447 U.S. 922 (1980).

> trial judge, if the challenge is sufficient on its face and any reasonable doubt of the judge's disinterestedness is suggested, the judge may be expected to disqualify himself. If he does not do so, in the case of a trial judge factual issues relating to disqualification should be properly determined by another judge . . . In the case of an appellate judge, however, that procedure would subject the judge to decision of his disinterestedness by official peers with whom he may continue to serve in a collegial capacity in deciding the case. Moreover, because an appellate court decides questions of law rather than fact, the question of an appellate judge's 'bias' is often practically indistinguishable from the question of his views on the law, which are not properly subject to disputation through the recusal procedure. Given these complications, it is better that the question of recusal be decided by the judge himself. . . . In the collegial decision-making of an appellate court an individual judge's purely personal views are of less significance than they would be in a trial court and he is subject to collegial restraint should he be inclined to act on them; an appellate judge has few occasions for exercising the broad discretion reposing in a trial judge; and in appellate litigation there is no occasion for the intense personal interaction between the judge and the lawyers and litigants that may occur in a trial court. Moreover, an appellate judge's established views on law and justice, at least up to a point, are a proper element of the contribution he makes to the function of an appellate court, particularly in the development of the law. A peremptory challenge might easily be abused to exclude a judge solely because a litigant disagreed with his views.

The procedures utilized by the Alabama Supreme Court in ruling on motions to disqualify comport with the modern approach to disqualification and the requirements of due process of law. When presented with the motions to disqualify in these cases the court referred the question

of recusal, discretionary in each instance, to each of its individual members. This procedure is in accord with the great weight of authority, as well as the American Bar Association Standards Relating to Appellate Courts. *See, e.g., Laird v. Tatum,* 409 U.S. 824 (1972); *Berger v. United States,* 255 U.S. 22 (1921); *Shadid v. Oklahoma City,* 494 F.2d 1267 (10th Cir. 1974); *Grimes v. United States,* 396 F.2d 331 (9th Cir. 1968); *Hawaii-Pacific Venture Capital Corp. v. Rothbard,* 437 F. Supp. 230 (D. Hawaii), appeal dismissed, 564 F.2d 1343 (9th Cir. 1977).

E. Recusal Only Required Where Reasonable Basis For Questioning Impartiality Exists.

Most judges honor high ethical standards in the profession and believe in fair trials for all litigants; they will voluntarily recuse themselves in any situation where their conduct or impartiality can be seriously questioned.

The standard for recusal sought to be established by petitioners misapplys long-standing rules and principles, both common law and statutory, and is manifestly unreasonable. Requiring recusal where a justice's personal life and experiences are so remotely associated with a case on appeal would cause the cost and delay of justice to go out of bounds. It would improperly subject to disputation through the recusal procedure a judge's views on the law. Justices would be required to live in a vacuum in order to sit on the cases heard and decided.

A justice who has a pending suit involving an automobile accident and maintained on a negligence theory could not sit on any case involving the negligence or alleged negligence of the operators of a motor vehicle. Would it also mean that the justice could never again sit on such

a case, even after his suit has been brought to a conclusion? What about all negligence cases? This hypothetical situation would apply to every other civil action imaginable. Notwithstanding the foregoing dilemma, there would always exist some minute ground for disqualification—the justice is a former plaintiff or defense attorney, a corporate or civil rights attorney, and he is therefore biased in favor of the class of litigants he once represented, or his views are too liberal or conservative. Such a standard of recusal would lead to judge shopping, increase the cost and delay of litigation and thereby thwart justice.

The standard for disqualification applied in Alabama is virtually identical to federal and state practice and affords litigants every consideration which our system of justice has to offer. That standard, guided by the rules and policies embodied in Canon 3(C) of the Canons of Judicial Ethics, as well as common law, is ultimately a standard of reasonableness. A reasonable person of ordinary prudence in the position of a State Supreme Court justice, with knowledge of all the facts known to the justice could not find that there exists a reasonable basis for questioning a justice's impartiality when that justice has no interest, pecuniary or otherwise, directly or indirectly, in the outcome of the litigation and harbors no personal bias or prejudice for or against any of the parties. The remote, speculative interest which is alleged in this case is not a financial interest in the subject matter in controversy, nor is it the type of other interest that could be substantially affected by the outcome of the proceeding as contemplated by Canon 3(C) (1).

Policy considerations of the ramifications of the adoption of such a recusal standard as well as an analysis of

the applicable statutory and case law point directly toward an affirmance of the proceedings below.

CONCLUSION

For the reasons advanced above, the judgment of the Alabama Supreme Court is due to be affirmed.

Respectfully submitted,

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